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Supreme Court of the United States

OCTOBER TERM, 1944

No. 729

AETNA INSURANCE COMPANY, ATLANTIC MUTUAL INSURANCE COMPANY, THE AUTOMOBILE INSURANCE COMPANY OF HARTFORD, THE BRITISH & FOREIGN MARINE INSURANCE COMPANY, LTD., COMMERCIAL UNION ASSURANCE COMPANY, LIMITED, THE CONNECTICUT FIRE INSURANCE COMPANY, THE CONTINENTAL INSURANCE COMPANY, FEDERAL INSURANCE COMPANY, HARTFORD FIRE INSURANCE COMPANY, THE HOME INSURANCE COMPANY, INSURANCE COMPANY OF NORTH AMERICA, NORTH BRITISH & MERCANTILE INSURANCE COMPANY, LIMITED, ROYAL INSURANCE COMPANY, LIMITED, STANDARD MARINE INSURANCE COMPANY, LIMITED, UNIVERSAL INSURANCE COMPANY and WESTCHESTER FIRE INSURANCE COMPANY,

Plaintiffs-Petitioners,

against

HENRY DUBOIS SONS COMPANY and HARTFORD FIRE INSURANCE COMPANY,

Defendants-Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF

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(BURLINGHAM, VEEDER, CLARK & HUPPER)

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Plaintiffs-Petitioners,

against

HENRY DUBOIS SONS COMPANY and HARTFORD FIRE INSURANCE COMPANY,

Defendants-Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners pray that a writ of *certiorari* issue to review the final decision of the United States Circuit Court of Appeals for the Second Circuit filed August 24, 1944, affirming a final judgment entered in the United States

District Court for the Southern District of New York on December 3, 1943, in favor of the defendants and against the plaintiffs (R. 27-9).

The Circuit Court of Appeals opinion (R. 35-43) is reported at 144 F. (2nd) 262. The District Court opinion (R. 20-7) is reported at 53 F. Supp. 516.

Jurisdiction

Jurisdiction is based on Section 240 (a) of the Judicial Code, as amended, 28 United States Code 347.

The mandate of the Circuit Court of Appeals was entered September 14, 1944 (R. 44).

Summary Statement

Aetna Insurance Company and the other petitioners were insurers of tug *Ariosa*. Respondent Hartford Fire Insurance Company was the insurer of the scow *D. 22*. Respondent DuBois was the owner and operator of both the tug and the scow (R. 3-4).

Through the tug's negligence the scow was caused to collide with the steamship *Segundo*, owned by a third party, and the scow, as well as the *Segundo* (which was also at fault), sustained damage (R. 5).

The tug underwriters did not question their obligation to satisfy DuBois' liability to the *Segundo's* owner, but the two sets of underwriters disagreed as to how DuBois' scow damage should be borne. This was because of the common ownership of the tug and the scow—in such case there could be no tort liability of DuBois as owner of the tug to DuBois as owner of the scow. However, in order that DuBois should not be out of pocket, the two sets of

underwriters, between them and without prejudice, reimbursed DuBois for his complete loss (including his liability to the *Segundo*) (R. 6-7), and the controversy was then submitted to the Court for determination on a declaratory-judgment complaint, all the allegations of which were admitted by defendants' answer (R. 17).

The Insurance and What the Underwriters Did

The tug policy was for $45,000 (Schedule B to the complaint).

The scow policy was for $10,000 (Schedule C to the complaint): this only partially insured the scow, for the scow's damages amounted to $18,524 (R. 5).

The policies covered legal liability resulting from collision, as well as physical damage.

As regards DuBois' liability to the *Segundo*, the tug underwriters paid $2,122.67 to enable DuBois to satisfy the final decree obtained against him by the *Segundo* for that amount (R. 6).

As regards the damage to the scow, the scow underwriter paid DuBois the full amount of the scow policy under a loan receipt (R. 4, 12), and the tug underwriters paid DuBois the balance of his loss, under the so-called "sister-ship" clause of the tug policy—quoted later. The payments thus made were $9,900 ($10,000, less a $100 policy deductible) by the scow underwriter (R. 4), and $9,765.78, plus the previously mentioned $2,122.67, by the tug underwriters (R. 6-7). With adjustments for interest and deductible average, which are not questioned, these payments aggregated DuBois' total loss and claim (R. 7).

It was contended, however, that the tug underwriters should pay an additional $11,483.36 (R. 7, 8). This sum represented the $9,900 paid to DuBois by the scow under-

writer, plus interest thereon from the time of payment (R. 7 at f. 20; R. 8 at f. 24).

Although DuBois is a nominal party, he has no financial interest at stake, since under the terms of the loan receipt, the so-called loan is repayable "only out of any net recovery", and any recovery would belong wholly to Hartford, the scow underwriter, who has full control over the proceedings (R. 12). It is conceded that in so far as the claim is put forward in the name of DuBois, it is put forward in the sole interest of Hartford (R. 8 at f. 24).

Since the insurers of a tug would ordinarily be liable only for damage to the tug [there was none here] and not for damage to another vessel belonging to the tug owner, the controversy turned on the effect to be given to the sister-ship clause in the tug policy. The collision clause and the sister-ship clause of the tug policy read as follows:

> "AND IT IS FURTHER AGREED that if the vessel hereby insured shall come into collision with any other vessel, craft or structure, floating or otherwise (including her tow); or shall strand her tow or shall cause her tow to come into collision with any other vessel, craft, or structure, floating or otherwise, and the Assured, as owner of the vessel, shall in consequence thereof become liable to pay and shall pay by way of damages to any other person or persons any sum or sums not exceeding in respect of any one such casualty the value of the vessel hereby insured, we, the Underwriters, will pay the Assured such proportion of such sum or sums so paid as our subscriptions hereto bear to the value of the vessel hereby insured. And in cases where the liability of the vessel has been contested, with the consent in writing, of a majority of the Underwriters on the hull and machinery (in amount), we will also pay a like proportion of the costs and expenses thereby incurred or paid; but when both vessels are to blame, then unless the liability of

the owners of one or both of such vessels becomes limited by law, claims under the collision clause shall be settled on the principle of CROSS LIABILITIES, as if the owners of each vessel had been compelled to pay to the owners of the other of such vessels such one-half or other proportion of the latter's damages as may have been properly allowed in ascertaining the balance or sum payable by or to the Assured in consequence of such casualty. * It is hereby further agreed that the principles involved in this clause shall apply to the case where two or more of the vessels involved are the property in part or in whole of the same owners, all questions of responsibility and amount of liability as between such ships or vessels being left to the decision of a single arbitrator, if the parties can agree upon a single arbitrator, or failing such agreement, to the decision of arbitrators, one to be appointed by the managing owners of such vessels, and one to be appointed by the majority in amount of Underwriters interested in each vessel; the two arbitrators chosen to choose a third arbitrator before entering upon the reference, and the decision of such single or of any two of such three arbitrators, appointed as above, to be final and binding: provided always that this clause shall in no case extend to any sum which the Assured may become liable to pay, or shall pay for removal of obstructions under statutory powers, or for loss of life or personal injury."

What the Circuit Court of Appeals Decided—Decisions Contra

The Circuit Court of Appeals held that in addition to the amounts paid by the tug underwriters as above stated, they must also pay the $9,900 (plus the interest thereon), paid by the scow underwriter. Thus, the entire loss was placed on the tug underwriters and the scow underwriter went free.

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* The sister-ship clause begins here.

The decision is squarely contrary to the ruling made in the Fourth Circuit some twenty years ago in a similar situation arising out of the *Augusta-Detroit* collision. The *Augusta* and the *Detroit* were of common ownership. Judge Harrington Putnam, as Arbitrator, held that the underwriters on the innocent barge *Detroit* could not invoke subrogation as against the negligent sister ship, the steamer *Augusta*, or her underwriters, or have the benefit of the sister-ship clause in the *Augusta* policies; that the steamer's underwriters were liable under the sister-ship clause only to the extent that the barge was not otherwise insured. That result was approved by the District Court of Maryland and by the Circuit Court of Appeals, Fourth Circuit. *The Augusta-Detroit* arbitration, 1930 A. M. C. 1035, 1037 [decided in 1923]; *McLanahan* v. *Marine Ins. Co.*, 1924 A. M. C. 872 (District of Maryland—not officially reported), aff'd 5 F. (2d) 773 (Fourth Circuit).

In the present case, the Second Circuit recognized that Hartford's hull insurance covered the scow. Since the Court held that the sister-ship clause of the tug policy covered DuBois' entire loss, then (if the Court was right) there were two insurances to which DuBois could look. In such a situation the loss should be borne by the two sets of underwriters in proportion to their respective commitments, as this Court held in *Home Insurance Co.* v. *Baltimore Warehouse Co.*, 93 U. S. 527. The Second Circuit refused, however, to apply that rule.

Questions Presented

Does the sister-ship clause in a policy on a vessel found to be at fault cover the entire damages sustained by a sister ship of that vessel, or only the uninsured part of such damages? Are the underwriters who insure a barge, entitled to the benefit of a sister-ship clause in a policy insuring a tug belonging to the same owner?

If the sister-ship clause coverage is not limited to the uninsured damages to the assured's other vessel, does the entire loss in respect to such other vessel fall on the sister-ship clause underwriters or should the loss be borne by the two sets of underwriters in proportion to their respective commitments?

Reasons for Granting the Writ

1. The decision of the Second Circuit is in conflict with the rule enunciated by the Fourth Circuit in *The Augusta-Detroit* case, *Marine Insurance Co.* v. *McLanahan*, 5 F. (2d) 773.

2. If it be assumed that the Second Circuit was right in holding that the sister-ship clause coverage was not limited to the uninsured damages sustained by the assured's other vessel, then the decision is in conflict with this Court's decision in *Home Insurance Co.* v. *Baltimore Warehouse Co.*, 93 U. S. 527.

WHEREFORE, petitioners respectfully pray that a writ of *certiorari* be issued out of and under the seal of this Honorable Court directed to the Circuit Court of Appeals for the Second Circuit commanding that Court to certify and to send to this Court for its review and determination on a day certain to be named therein, a full and complete transcript of the record and of the proceedings in the case numbered and entitled on its dockets No. 402, October Term, 1943, *Aetna Insurance Company, et al., Appellants, against Henry DuBois Sons Company and Hartford Fire Insurance Company, Appellees,* and that the decision of the said Circuit Court of Appeals in said case be reversed and that your petitioners have such other and further relief in the premises as may be just.

AETNA INSURANCE COMPANY, et al.,
Petitioners,
By RAY ROOD ALLEN,
Attorney.

New York, December 1, 1944.